October 14, 1999

The Honorable William R. Archer III, M.D.
Commissioner of Health
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

Open Records Decision No. 662

Re: Confidentiality, under section 161.254 of the Health and Safety Code, of reports of tobacco ingredients submitted to the Texas Department of Health (ORQ-31)

Dear Commissioner Archer:

You ask about the confidentiality of information to be submitted to the Texas Department of Health (the "department") under section 161.252 of the Texas Health and Safety Code regarding the ingredients in tobacco products. We are responding to your inquiry in the form of an open records decision.

Chapter 161, Subchapter N (Disclosure of Ingredients in Cigarettes and Tobacco Products), of the Texas Health and Safety Code requires tobacco manufacturers to report annually to the department the identity of each ingredient in a cigarette or tobacco product (other than tobacco, water, or reconstituted tobacco sheet made wholly from tobacco) listed in descending order according to weight, measure or numerical count, as well as nicotine yield ratings established under section 161.253. *Id.* § 161.252(a).[1] The department is to provide by rule for the form and the time for filing of such reports. *Id.* § 161.252(c).[2]

Section 161.254 provides:

> (a) Except as provided by Subsections (b), (c), and (d), information included in a report filed under this subchapter is public information and is not confidential unless it is determined to be confidential under this section.

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[1]Subsection (b) of section 161.252 provides that manufacturers are not required to disclose ingredients the United States Food and Drug Administration has approved as safe when burned and inhaled.

[2]Subchapter N (Disclosure of Ingredients in Cigarettes and Tobacco Producs) was added by Act of May 23, 1997, 75th Leg., R.S., ch. 1216, § 1, 1997 Tex. Gen. Laws 4672.

> (b) The department may not disclose information under Subsection (a) until the department has obtained the advice of the attorney general under this section *with respect to the particular information to be disclosed.* If the attorney general determines that the disclosure *of particular information* would constitute an unconstitutional taking of property, the information is confidential and the department shall exclude that information from disclosure.
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> (c) Information included in a report filed under this subchapter is confidential if the department determines that there is no reasonable scientific basis for concluding that the availability of the information could reduce risks to public health.
>
> (d) Information included in a report filed under this subchapter is confidential under chapter 552, Government Code, if the information would be excepted from public disclosure as a trade secret under state or federal law. (Emphasis added.)

The department has, to date, not advised this office that it has established a date for reporting or received any reports. But you ask, with respect to the provisions of subsection (b), whether disclosure of the ingredients included in the reports will constitute an unconstitutional taking. You suggest that ingredients reported to the department but not otherwise made public by the manufacturer should be considered "trade secrets" such that their disclosure by the department would amount to an unconstitutional taking under subsection (b), *supra*. In our opinion, this office's determination as to whether disclosure of a particular report's contents would constitute an unconstitutional taking will require analyzing the submitted report itself.

Should there be a request for disclosure of the reports once they have been submitted to the department, this office will, if necessary, determine at that time whether disclosure of the particular information at issue would constitute an "unconstitutional taking" under section 161.254(b). A determination under section 161.254(b) would include, but perhaps not be limited to, determining whether there has been a *prima facie* case made for the information's trade secret status. Such analysis by this office would follow the rule of *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958), which relies upon the definition of trade secrets contained in the RESTATEMENT OF TORTS, section 757.[3] *Cf.* Gov't

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[3]According to the Restatement, a trade secret is

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

RESTATEMENT OF TORTS § 757 cmt. b (1939). Additionally, the Restatement provides six factors to be considered in determining whether particular information constitutes a trade secret:

> (1) the extent to which the information is known outside of [the] business;

Code § 552.110 (trade secret and confidential commercial or financial information excepted from disclosure under Texas Public Information Act). *See also, e.g., Philip Morris, Inc. v. Harshbarger*, 159 F.3d 670 (1st Cir. 1998) (analysis of law of unconstitutional taking; finding that regulatory disclosure of tobacco ingredient trade secret information without adequate compensation would be unconstitutional taking).

You also ask about the other exceptions to disclosure set out in section 161.254. Subsection (c) of section 161.254 provides an alternative basis for the department's withholding information in the reports. It makes information in reports confidential "if the department determines that there is no reasonable, scientific basis for concluding that the availability of the information could reduce the risks to public health." Thus, should the department receive a request for report information and determine that "there is no reasonable, scientific basis for concluding that the availability of the information could reduce the risks to public health," it may withhold the requested information without seeking the determination of this office.

Subsection (d) of section 161.254 makes report information confidential under the Texas Public Information Act (the "TPIA") if the information would be excepted from public disclosure as a trade secret under state or federal law. You ask whether the following two federal statutes, in conjunction with subsection (d), make ingredient information reported to the department under chapter 161 confidential: (1) the Federal Cigarette Labeling and Advertising Act[4] (the "FCLAA"), as amended by the Comprehensive Smoking Education Act (the "CSEA"); and (2) the Comprehensive Smokeless Tobacco Health Education Act of 1986[5] (the "Smokeless Tobacco Act.")

The FCLAA, as amended by the CSEA, mandates warning notices on each package of cigarettes and in each advertisement of cigarettes to inform the public about possible adverse health effects of cigarette smoking and requires manufacturers to "annually provide the

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(2) the extent to which it is known by employees and others involved in [the] business;

(3) the extent of measures taken to guard the secrecy of the information;

(4) the value of the information to [the company] and [its] competitors;

(5) the amount of effort or money expended . . . in developing the information; and

(6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id.

[4]15 U.S.C. §§ 1331-41.

[5]15 U.S.C. §§ 4401-08.

Secretary [of Health and Human Services] with a list of the ingredients *added to* tobacco in the manufacture of cigarettes."[6] (Emphasis added.)

Section 1335a(b)(2)(A) of the FCLAA specifically provides:

> *Any information provided to the Secretary under subsection (a) of this section shall be treated as a trade secret* or confidential information subject to section 552(b)(4) of Title 5 [providing a trade secret exemption for disclosure under the Freedom of Information Act] and section 1905 of Title 18 [criminalizing disclosure of confidential information by federal officers or employees] and shall not be revealed, except as provided in paragraph (1) [respecting the Secretary's report to Congress], to any person other than those authorized by the Secretary in carrying out their official duties under this section.[7] (Emphasis added.)

The Smokeless Tobacco Act bans the advertising of smokeless tobacco on radio and television and establishes a rotating warning requirement for package labels and advertising, with specific warnings regarding the potential adverse health effects of smokeless tobacco products.[8] Like the FCLAA, the Smokeless Tobacco Act provides for anonymous and aggregate ingredient reporting to the Secretary of Health and Human Services, and additionally requires smokeless tobacco manufacturers to specify the nicotine quantity contained in each product.[9]

Section 4403(b)(2)(A) of the Smokeless Tobacco Act specifically provides:

> *Any information provided to the Secretary under subsection (a) of this section shall be treated as a trade secret* or confidential information subject to section 552(b)(4) of Title 5 [providing a trade secret exemption for disclosure under the Freedom of Information Act], and shall not be revealed, except provided in paragraph (1), to any person other than those authorized by the Secretary in carrying out their official duties under this section.[10] (Emphasis added.)

The specific information afforded trade secret protection under these federal laws is a list of the ingredients *added to* tobacco in the manufacture of cigarettes or smokeless tobacco products, and, in the case of smokeless tobacco products, the nicotine quantity. In our opinion, it was the intent of the legislature in adopting subsection (d) of section 161.254, that

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[6] 15 U.S.C. § 1335a(a).

[7] 15 U.S.C. § 1335a(b)(2)(A).

[8] 15 U.S.C. § 4402.

[9] *Id.* § 4403(a)(1).

[10] *Id.* § 4403(b)(2)(A).

the information excepted from public disclosure as a trade secret under the federal FCLAA and the Smokeless Tobacco Act would also be confidential when reported to the department under chapter 161, Subchapter N, and thus not subject to public disclosure for purposes of a request for information under the TPIA.

If it had not been the intent of subsection (d) to make the federal FCLAA and Smokeless Tobacco Act non-disclosure provisions applicable to information reported to the department under chapter 161, then the provision would be superfluous since, as we will discuss below, it would only provide the same or less protection for the information than that already afforded by subsection (b). First, we are aware of no other federal *statutory* provisions which would apply to the report information. And, to the extent it exists, the *common law* of federal trade secrets is more restrictive in its protection than Texas law, which latter, as noted above, utilizes the standards set out in the Restatement. *See, e.g, Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983) (defining "trade secret" for purposes of federal Freedom of Information Act exemption 4 as "a secret, commercially valuable plan, formula, process, or device that is used for making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort," and rejecting broader Restatement analysis). Thus, any protection of federal law under subsection (d) for the ingredient information reported to the department, would be less than that afforded by state law under the subsection, since the test for whether the information was protected by state law under subsection (d) would, in effect, be whether the information was within the Restatement definition. Moreover, as noted above, the Restatement definition of "trade secret" would also be the principal test applied in a determination by this office under subsection (b) of section 161.254 as to whether disclosure of ingredient information reported to the department would be an "unconstitutional taking." Thus the protection of subsection (d), would only be the same or less than that already afforded by subsection (b). We do not believe the legislature, in adding subsection (d), would have intended that it only be redundant of subsection (b).[11]

Please note, however, that the referenced federal provisions protect from disclosure only the identity of those ingredients "added to" tobacco in the manufacturing process. The department, by rule, has defined "ingredient" as

> [a]ny ingredient, substance, chemical or compound other than tobacco, water or reconstituted tobacco sheet made wholly from tobacco, which is *present in the product* including but not limited to, flavorants, processing aides, casing sauces, contaminants, combustion modifiers, and packing materials, to the full extent the manufacturer is aware of the presence of any such ingredient. (Emphasis added.)

25 T.A.C. § 101.2(7). Thus, if it happens that an ingredient is present in the tobacco product as a result of something other than being added in the manufacturing process, it would not be exempt from disclosure by virtue of the federal provisions discussed above.

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[11]Subsection (d) of section 161.254 was added as an amendment to the bill adopting chapter 161. S.J. of Tex., 75th Leg., R.S., ch. 2417 (1997).

SUMMARY

Reports of tobacco ingredients to the Texas Department of Health under section 161.252 of the Health and Safety Code may not be disclosed if the attorney general determines that disclosure would constitute an "unconstitutional taking" under section 161.254(b), if the department determines that disclosure would not reduce risks to public health under section 161.254(c), or if the attorney general determines that the information is treated as a trade secret under state or federal law, pursuant to section 161.254(d).

The attorney general cannot make the determination required by section 161.254(b), as to whether disclosure would constitute an unconstitutional taking, without reviewing the specific information submitted to the department. In requesting the attorney general's determination under subsections (b) and (d) of section 161.254, the department should use the procedures set out in the Texas Public Information Act. The department need not seek a decision of the attorney general in order to withhold report information under subsection (c) of section 161.254.

With respect to section 161.254(d), this decision serves as the attorney general's previous determination for purposes of the Texas Public Information Act that information treated as a trade secret under the Federal Cigarette Labeling and Advertising Act as amended by the Comprehensive Smoking Education Act of 1984, and the Comprehensive Smokeless Tobacco Health Education Act of 1986, must be withheld from disclosure.

Yours very truly,

JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant Attorney General

CLARK KENT ERVIN
Deputy Attorney General - General Counsel

REBECCA L. PAYNE
Chief, Open Records Division

William Walker
Assistant Attorney General - Open Records Division